Opinion issued March 25, 2021

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00415-CV

NATHAN WHITE, Appellant

V.

CITY OF HOUSTON, Appellee

On Appeal from the 61st District Court
Harris County, Texas
Trial Court Case No. 2017-54697

O P I N I O N

Nathan White sued the City of Houston for personal injury. The City filed a plea to the jurisdiction, which the trial court granted. White appeals. We affirm.

BACKGROUND

White alleged that an unsecured firehose became entangled in his car's rear axle as one of the City's firetrucks passed him on the street. The firetruck then dragged his car for about 30 feet before the hose came free. He asserted a cause of action for negligence complaining of the following acts or omissions:

> a. failing to properly stow and secure equipment, including the subject fire hose, on the fire truck, which the operator knew or should have known posed a high degree of risk of serious injury to persons, including Plaintiff;
>
> b. failing to maintain a proper lookout while operating the fire truck;
>
> c. allowing an item appurtenant to the fire truck or vehicle equipment to trail behind the fire truck while operating on public roads;
>
> d. failing to mark items extending from and trailing behind the fire truck in a safe and proper manner;
>
> e. failing to maintain proper control of items appurtenant to the fire truck [and/or] vehicle equipment;
>
> f. failing to operate the fire truck in a reasonable and prudent manner under the circumstances then existing;
>
> g. failing to comply with all applicable laws or ordinances that apply to an emergency situation, if any;
>
> h. violating the terms and provisions of the Texas Transportation Code; and
>
> i. upon information and belief, there are other acts of negligence, incompetence, recklessness, and/or omissions which may be proved at trial.

White sought to recover damages for personal injuries he sustained in the accident and medical expenses he incurred as a result.

White pleaded that the City had waived its governmental immunity under the Texas Tort Claims Act's waiver of immunity for personal injury arising from the operation or use of a motor-driven vehicle and motor-driven equipment. *See* TEX. CIV. PRAC. & REM. CODE § 101.021(1). He further alleged that the emergency exception did not apply because the City's firefighters did not comply with laws or ordinances applicable to the emergency action or else acted with reckless disregard for the safety of others. *See id.* § 101.055(2).

After discovery, the City filed a plea to the jurisdiction. In its plea, the City maintained the evidence showed the firetruck was on an emergency call at the time of the accident, its crew did not operate the truck in a reckless manner and did not violate any laws en route, and its crew was not aware that the hose had come loose and caused the accident until after the fact. The City argued that it had not waived its immunity under the circumstances for three reasons:

(1) because the firefighters were dispatched to an emergency, the emergency and 911-emergency-service exceptions negated any waiver of liability that otherwise could apply to the accident under the Tort Claims Act;

(2) the firefighters have official immunity, which in turn negates the City's liability for negligent use of a motor-driven vehicle or motor-driven equipment because the City's governmental immunity for negligence of this kind is waived only to the extent the firefighters would be liable; and

(3) because the hose was not in use when it came loose from the truck and caused the accident, the Tort Claims Act's waiver of immunity for injury caused by a condition or use of tangible property did not apply.

See id. §§ 101.021(1)(B), 101.021(2), 101.055(2), 101.062(b).

In support of these arguments, the City attached several documents to its jurisdictional plea, including the Houston Police Department report on the accident; the affidavit of J.P. Cody, a Captain with the Houston Fire Department; and the transcript of Cody's deposition.

White opposed the City's jurisdictional plea. In his response, White emphasized that he alleged the firefighters committed negligent acts and omissions both while on the road and beforehand. White supported his opposition with excerpts from the depositions of the four firefighters who crewed the firetruck in question when the accident occurred—Captain Cody, N. Evans, J. Clemente, and C. Hershey.

The trial court granted the City's plea and dismissed White's claims.

White appeals.

DISCUSSION

On appeal, the issues have narrowed. White argues that the City's immunity is waived under the Tort Claims Act's provision for liability when personal injury is caused by a condition or use of property. He posits that the City's firefighters negligently stowed and secured the hose that came loose and that this negligence caused his injuries. White also argues that because there is evidence that the firefighters' negligence occurred three hours before the accident, the emergency exception does not bar his negligence claim as a matter of law.

Standard of Review

Governmental immunity protects political subdivisions, like cities, from lawsuits unless the Legislature has clearly and unambiguously waived that immunity. *City of Conroe v. San Jacinto River Auth.*, 602 S.W.3d 444, 457 (Tex. 2020). An assertion of governmental immunity implicates subject-matter jurisdiction and is properly raised in a plea to the jurisdiction. *Id.*

When a governmental unit asserts immunity, the plaintiff must show that the trial court has jurisdiction by alleging a valid waiver of immunity. *Ryder Integrated Logistics v. Fayette Cty.*, 453 S.W.3d 922, 927 (Tex. 2015) (per curiam). If the plea challenges the plaintiff's pleadings, the court must determine whether the plaintiff has alleged facts that affirmatively demonstrate that there is jurisdiction. *Id.* In doing so, the court must liberally construe the pleadings in the plaintiff's favor. *City of Houston v. Houston Mun. Emps. Pension Sys.*, 549 S.W.3d 566, 575 (Tex. 2018).

The parties may also submit evidence in connection with a jurisdictional plea. *Chambers–Liberty Ctys. Nav. Dist. v. State*, 575 S.W.3d 339, 345 (Tex. 2019). The trial court's review of any evidence mirrors the summary-judgment standard. *Id.* If the evidence creates a fact question as to the jurisdictional issue, the trial court cannot grant the plea, and the fact issue must be resolved by the factfinder. *Id.* But if the evidence is undisputed or does not raise a fact question on the jurisdictional issue, the trial court rules on the jurisdictional plea as a matter of law. *Id.*

We review the trial court's ruling on a jurisdictional plea de novo. *Id.* We likewise review any questions of statutory construction de novo. *Id.*

Applicable Law

Waiver of Immunity for Injury Caused by a Condition or Use of Property

Under the Tort Claims Act, a governmental unit is liable for "personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law." TEX. CIV. PRAC. & REM. CODE § 101.021(2).

A condition of tangible personal property can refer to an intentional or an inadvertent state of being. *Sampson v. Univ. of Tex. at Austin*, 500 S.W.3d 380, 388 (Tex. 2016). To invoke waiver based on a condition of tangible personal property, the plaintiff must allege that the property was defective or inadequate so that its intended and ordinary use posed a hazard to him. *Id.*

To invoke waiver based on use of tangible personal property, the plaintiff must allege that the governmental unit put or brought the property into action or service or employed the property for or applied it to a given purpose. *Tex. Dep't of Crim. Justice v. Rangel*, 595 S.W.3d 198, 206 (Tex. 2020). This use of the property must have actually caused the plaintiff's injury. *Id.* Moreover, the plaintiff's alleged injury must be contemporaneous with the property's use to qualify under this waiver of immunity. *Harris Cty. v. Annab*, 547 S.W.3d 609, 613 (Tex. 2018).

By definition, the non-use of or failure to use property is not a use of property. *Id.* at 614. Hence, an allegation that a governmental unit failed to use property does not suffice to invoke the waiver of immunity for the use of property. *Sampson*, 500 S.W.3d at 389. An allegation that a governmental unit failed to use property with a more effective safety feature than the property it did use is likewise insufficient to invoke the waiver of immunity for the use of property. *Tex. A & M Univ. v. Bishop*, 156 S.W.3d 580, 584 (Tex. 2005).

However, a narrow exception applies when a plaintiff alleges that property used by a governmental unit lacked an integral safety component altogether and this component's complete absence caused the plaintiff's injuries. *City of N. Richland Hills v. Friend*, 370 S.W.3d 369, 372 (Tex. 2012). For example, the Court has held that a state university's provision of a football uniform and its related protective equipment to a player without a knee brace was sufficient to invoke the waiver of immunity for a condition or use of tangible personal property, given the athlete's prior knee injury. *Lowe v. Tex. Tech Univ.*, 540 S.W.2d 297, 300 (Tex. 1976).

Emergency Exception to the Waiver of Governmental Immunity

Governmental immunity nonetheless is not waived with respect to a claim arising "from the action of an employee while responding to an emergency call or reacting to an emergency situation if the action is in compliance with the laws and ordinances applicable to emergency action, or in the absence of such a law or

ordinance, if the action is not taken with conscious indifference or reckless disregard for the safety of others." TEX. CIV. PRAC. & REM. CODE § 101.055(2).

In terms of traffic laws, the operator of an authorized emergency vehicle may operate it in certain ways that otherwise would be unlawful. When responding to an emergency call or fire alarm, the operator of a firetruck may lawfully:

- proceed past a stop sign or red traffic light;
- exceed the maximum speed limit, as long as doing so does not endanger life or property; and
- disregard regulations controlling the direction of travel or turning.

TEX. TRANSP. CODE §§ 546.001(2)–(4), 546.002(b)(1), (3). When doing so, the operator generally must use the firetruck's emergency lights or sirens. *See id.* §§ 546.003–.004. Nonetheless, the operator is neither relieved from the duty to operate the firetruck with appropriate regard for the safety of all persons nor the consequences of reckless disregard for others' safety. *Id.* § 546.005.

That said, by its plain language, the emergency exception is not confined to the manner in which emergency vehicles are operated in an emergency situation. *See, e.g.*, *City of San Antonio v. Hartman*, 201 S.W.3d 667, 669, 672–73 (Tex. 2006) (applying emergency exception in case in which plaintiffs alleged city failed to timely erect barricades to prevent traffic from driving into flooded area).

For purposes of the emergency exception, conscious indifference and reckless disregard require proof that a governmental actor knew the relevant facts but did not care about the result. *Id.* at 672 n.19.

Analysis

Waiver for Condition or Use of Tangible Personal Property

The summary-judgment evidence is largely undisputed. When the accident in question happened, the firetruck had been dispatched to a house fire. En route to the fire, a hose stored on the rear portion of the truck came loose. The truck dragged the hose behind it and the hose eventually became entangled with White's vehicle. The firetruck then dragged White's vehicle for some distance until the hose broke free from the truck. None of the four firefighters onboard the truck realized what had happened until afterward. Upon returning to their station, the firefighters discovered that the hose was missing and learned of the accident after retracing their route.

The hose in question was stored behind the firetruck's cab. It was stowed in a compartment or hose bed that has a lid or cover. The hose is an inch and three quarters in diameter. It was folded across itself, or cross-laid, in four segments, each being about 50 feet in length. One end of the hose was attached to an additional short length of hose about 3 to 4 feet long that was connected to the truck. The other end of the hose had a metal nozzle for spraying water affixed to it. When properly cross-

laid, the hose fits relatively snugly inside the compartment. But there was no device or mechanism within the compartment that secured the folded hose in place.

White does not assert that a condition of the hose itself caused his injuries. He instead argues that the hose lacked an integral safety component, specifically a device or mechanism designed to secure it in place during transport. For example, Captain Cody testified that there was no means of securing the hose once it was cross-laid in the compartment. He further testified that such devices do exist, specifically a kind of canvas cover with hooks. Cody thought that other trucks operated by the Houston Fire Department have this device. Similarly, Evans testified that nets or tarps can be used to hold a hose in place. But he stated the truck in question did not have any component designed to secure the hose in place once it was cross-laid in the compartment. Clemente and Hershey likewise testified that nothing held the hose in place inside the compartment. The record does not contain any contrary evidence. And while Cody described the dislodgment of the hose as a "fluke" or "outlier," he acknowledged that he had heard of at least one or two prior instances in which a hose had slid out of its compartment while being transported.

The City responds that this evidence is immaterial because at most it supports an allegation of non-use of different equipment than the Houston Fire Department used. We disagree.

White does not assert that the Houston Fire Department should have used a different type of hose or a firetruck with a differently designed storage compartment. Rather, White alleges that the hose, or the compartment in which it was stowed, lacked an integral safety component to secure the hose in place while in transit. This allegation, and the undisputed evidence that such components exist and are used, suffice to invoke the statutory waiver for a condition or use of tangible personal property. *See Friend*, 370 S.W.3d at 372; *Lowe*, 540 S.W.2d at 300.

The City also responds that White's allegations are legally insufficient to invoke this statutory waiver of immunity because the evidence indisputably shows that the firefighters were not using the hose for its intended and ordinary purpose when the accident occurred and that White's resulting injuries likewise were not contemporaneous with their use of the hose. We again disagree.

When the accident happened, firefighters were not using the hose to extinguish or contain a fire. They were not handling the hose at all. But "the plain meaning of 'use' does not necessarily require physical manipulation of an object." *Rangel*, 595 S.W.3d at 207. The hose need only have been put or brought into action or service to qualify as being used. *Id.* By being stowed and transported on the truck, the hose was put or brought into service to extinguish fires as needed. When the hose became dislodged, it was being transported in a firetruck en route to a fire. Thus, the hose was in use when it caused the accident in which White was injured.

Transporting a firehose to a location where it is to be employed to extinguish a fire is as much a part of its intended and ordinary use as extinguishing a fire. White's injuries therefore were contemporaneous with the alleged use of the hose.

The City relies on *Sampson* for its contrary position, but *Sampson* is inapposite. In *Sampson*, the plaintiff sued a state university after tripping on an extension cord. 500 S.W.3d at 383. The Court held that the plaintiff's claim was one for premises defect rather than negligence relating to a condition or use of tangible personal property because the plaintiff did not allege the extension cord was defective and it was undisputed that the cord was resting in a static position, rather than being actively deployed or put into place, at the time of the accident. *Id*. at 390–91. Here, however, we are not called on to distinguish a premises-defect claim from one for negligent activity. White's allegations involve the latter, and the hose in question was far from static when it became entangled with White's vehicle. Unlike *Sampson*'s stationary unattended extension cord, firefighters were actively transporting the firehose from one place to another when the accident occurred.

We thus hold that White has alleged a claim that is legally sufficient to invoke the statutory waiver of governmental immunity for injuries caused by a condition or use of tangible personal property and that the summary-judgment evidence relevant to this issue does not foreclose the applicability of this waiver as a matter of law.

Emergency Exception to Waiver of Governmental Immunity

The question then becomes whether the emergency exception to the waiver of governmental immunity applies. White argues that the exception does not apply because the negligence he alleges—the negligent stowing of the hose—occurred some time before the emergency response rather than during it. We disagree.

It is undisputed that the firetruck had been dispatched to an emergency situation, specifically a house fire, at the time of the accident. According to the police report, Clemente, who was behind the wheel, told the investigating officer that the truck's lights and sirens were activated while en route to the fire. Cody submitted an affidavit in which he also stated that the lights and sirens were activated. Cody further represented that, as the officer in charge and a front-seat passenger, he did not see Clemente operate the truck in an improper or reckless manner or violate any law or departmental rules while en route to the fire. The record does not contain any evidence that contradicts Cody's account. In addition, all four firefighters on the truck testified that they did not know the hose had come loose and caused an accident before they returned to their station.

White does not dispute that the firetruck was responding to an emergency when the accident happened. He instead tries to sidestep the emergency exception by arguing that the negligence that caused his injuries—the negligent stowing or securing of the hose—preceded the emergency and that his claim therefore does not

arise from the actions of the firefighters while responding to the emergency call. *See* TEX. CIV. PRAC. & REM. CODE § 101.055(2) (providing that governmental immunity is not waived with respect to claims "arising . . . from the action of an employee while responding to an emergency call or reacting to an emergency situation").

The fatal flaw in White's argument is that the mere act of stowing the hose in the firetruck was not contemporaneous with the accident or his alleged injuries and therefore does not qualify for the waiver of immunity for a condition or use of tangible personal property in the first place. To qualify for the waiver pertaining to a condition or use of property, White must allege that he was injured while the firefighters used the hose. *See Annab,* 547 S.W.3d at 613. Assuming for the sake of argument that stowage alone could constitute use of the hose, White does not allege he was injured when the firefighters stowed the firehose. The evidence is not definitive as to exactly when the hose was stowed in the truck, but it is undisputed that firefighters did so well before the truck departed the station—either earlier in the morning or on a prior shift. It was only the later transport of the stowed hose while responding to a house fire—and the hose's dislodgment en route—that coincided with the accident and White's injuries. Thus, White's claim necessarily arises from the firefighters' transport of the allegedly negligently stowed hose while responding to the emergency call, which makes the exception applicable. Because there is not a fact issue as to whether the firefighters were responding to an

emergency when the accident happened, and there is no evidence that the firefighters were aware the hose had become dislodged but did not care about the danger this posed to motorists, the emergency exception is applicable as a matter of law. *See Hartman*, 201 S.W.3d at 672–73 (applying exception as matter of law when evidence showed city was responding to emergency and there was no allegation that city had violated law or ordinance or did not care what happened to motorists).

In other words, White's emergency-exception argument is self-defeating because it contradicts the very basis on which he seeks to invoke the Tort Claims Act's waiver of immunity for injuries caused by a condition or use of property. White cannot contend both that the fire department's use of the hose while responding to an emergency was contemporaneous with the accident that caused his injuries for purposes of the waiver of immunity but that his negligence claim actually arises from an altogether different action taken by the firefighters before responding to the emergency when assessing whether the emergency exception negates the waiver.

We hold that the emergency exception to the Tort Claims Act's waiver of governmental immunity applies to White's claim. Thus, the trial court did not err in granting the City's jurisdictional plea based on governmental immunity.

Because the City is immune from suit based on the emergency exception, we need not address the parties' disputes about whether the individual firefighters have official immunity and whether this also defeats White's suit against the City.

CONCLUSION

We affirm the trial court's judgment.

Gordon Goodman
Justice

Panel consists of Justices Goodman, Landau, and Guerra.